

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

FREEPORT-MCMORAN BAGDAD INC.

and

PETE TARTAGLIA, JR., an individual

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CASE NO. 28-CA-257171

**POST-HEARING BRIEF OF
FREEPORT-MCMORAN BAGDAD INC.**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE PARTIES.....	2
III. STATEMENT OF THE CASE.....	2
IV. STATEMENT OF FACTS	3
A. Company Policies and Procedures.....	3
1. The Company’s Core Values	3
2. Guiding Principles (GP).....	3
3. Principles of Business Conduct (PBC)	4
4. Safety – Haul Truck Passing Procedures	4
B. Tartaglia’s Position / The 2017 Discharge / Reinstatement Issues	5
1. Tartaglia’s 2017 Discharge and Reinstatement in 2018	5
2. Tartaglia Was a Shovel Operator	5
3. Post-Reinstatement Dispute: Tartaglia Wrongly Contends He Was Not Properly Paid.....	5
C. Tartaglia Receives a Final Warning For Refusing to Attend Required Training.....	6
1. Tartaglia Refuses Assigned Work of Attending Required Training.....	6
2. Tartaglia Is Placed on IWP and Receives a Final Warning	8
3. Tartaglia Appeals the Final Warning / Files A Charge With NLRB	9
D. Tartaglia Violates The Company’s Safety Rule On Passing	12
1. Eisner Denied Tartaglia’s Request For Permission To Pass.....	12
2. Montana Covey Warner	14
3. Ken Potter	15
4. The Radio Recording – Eisner Denied Tartaglia’s Request For Permission To Pass	16
E. Failure to Freeze The Scene – Eisner, Covey and Potter Receive Coaching	16
F. Tartaglia Is Placed On IWP / The February 13, 2020 Meeting	17
1. Tartaglia is Placed on IWP	17
2. The February 13, 2020 Meeting.....	18
G. Haris Kudadiri Makes The Decision to Discharge Tartaglia.....	19
H. The February 21, 2020 Discharge Meeting	20
I. LaFon Did Not Threaten Employees	20
J. Tartaglia Appeals His Discharge / The Discharge is Upheld	21
1. At Step 2 Tartaglia Is Offered And Refused to Take the Evidence File	21

2.	Step 3 of the PSP.....	21
3.	Step 4 – Arbitration – The Discharge Is Upheld.....	23
K.	Dustin Mikes (“Mikes”).....	23
1.	Mikes Was Not Involved in Prior Investigations of Tartaglia.....	24
2.	The February 13 th Meeting	24
3.	The Decision To Discharge Tartaglia	25
4.	The Discharge Notice / The Discharge Notice Was Not A Threat.....	25
V.	ARGUMENT.....	26
A.	Witness Credibility	26
1.	The ALJ Should Credit FMBI’s Witnesses Wherever the Testimony Conflicted.....	26
2.	Tartaglia Lacked Credibility	31
B.	Unfair Labor Practice Allegations	36
1.	The GC Failed To Offer Any Evidence To Support The 8(a)(1) Allegation that FMBI Unlawfully Threatened Its Employees	37
2.	The GC Failed To Prove The 8(a)(4) Allegation that FMBI Discharged Tartaglia For Engaging in Protected Activity.....	39
a.	Legal Standard	39
b.	Tartaglia’s dishonesty during FMBI’s investigation was not protected activity.....	40
c.	The GC has not shown FMBI had knowledge of Tartaglia’s protected activity.....	42
d.	The GC has not shown animus on FMBI’s part	43
e.	Positive intervening events are evidence of a <i>lack of animus</i>	45
f.	Intervening events by Tartaglia defeat the GC’s prima facie showing that Tartaglia’s protected conduct was a motivating factor in FMBI’s decision to discharge Tartaglia.....	46
VI.	CONCLUSION.....	46

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cordua Restaurant, Inc.</i> , Unpublished NLRB Order (Aug. 15, 2018)	43
<i>Daikichi Sushi</i> , 335 NLRB 622 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003)	26
<i>Divi Carina Bay Resort</i> , 356 NLRB 316 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011)	37, 38
<i>Double D Construction Group</i> , 339 NLRB 303 (2003)	26
<i>Electrolux Home Products</i> , 368 NLRB No. 34 (2019)	44
<i>Epic Systems v. Lewis</i> , 138 S.Ct. 1612 (2018)	43
<i>Fluor Daniel, Inc.</i> , 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992)	44
<i>Fresenius USA Mfg., Inc.</i> , 362 NLRB 1065 (2015)	40, 41
<i>Gaylord Hospital and Jeanine Connelly</i> , 359 NLRB 1266 (2013)	46
<i>General Motors LLC</i> , 369 NLRB No. 127 (2020)	44
<i>Grand Rapids Die Casting Corp.</i> , 279 NLRB 662 (1986)	37
<i>Manville Forest Products Corp.</i> , 269 NLRB 390 (1984)	40
<i>Mediplex of Danbury</i> , 314 NLRB 470 (1994)	37
<i>Miller Electric Pump & Plumbing</i> , 334 NLRB 824 (2001)	37
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983)	39

<i>OPW Fueling Components,</i> 343 NLRB 1034 (2004)	37
<i>Precoat Metals,</i> 341 NLRB 1137 (2004)	26
<i>Snap-On Tools, Inc.,</i> 342 NLRB 5 (2004)	46
<i>Tschiggfrie Properties, Ltd.,</i> 368 NLRB No. 120 (2019)	39
<i>White Plains Hospital Center,</i> 2011 NLRB 533 (2011)	46
<i>Woodruff & Sons, Inc.,</i> 265 NLRB 345 (1982)	46
<i>Wright Line,</i> 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)	39, 40, 41
Statutes	
National Labor Relations Act Section 7	2, 37, 44
National Labor Relations Act Section 8(a)(1) and 8(a)(4)	2, 36

Freeport-McMoRan Bagdad Inc. (hereinafter the “Company”, “FMBI” or “Respondent”) respectfully submits the following post-hearing brief to the Honorable Amita B. Tracy, Administrative Law Judge (“ALJ”)

I. INTRODUCTION

Pete Tartaglia, Jr. (“Tartaglia”) turned a manageable problem into a terminable offense by repeatedly being dishonest and intentionally misrepresenting material facts during the investigation into his violation of a Company safety rule on passing. For this Tartaglia can only blame himself. He knew that any violations of the Company’s core values, Guiding Principles and/or Principles of Business Conduct while he was on a Final Warning could result in discharge, yet he knowingly violated the Company’s safety rule on passing and then, during the investigation into his safety violation, he knowingly violated the Company’s Core Values, Guiding Principles, and Principles of Business Conduct by repeatedly being untruthful and knowingly misrepresenting material facts.

The Counsel for the General Counsel (“CGC”) built his case on an evidentiary foundation consisting of Tartaglia’s self-serving (and evolving) testimony. Tartaglia’s testimony was not credible and, for the most part, was not focused on the issues in this case. At the end of the hearing, there was no credible evidence to support the allegations by the General Counsel (“GC”) and certainly no evidence to rebut the consistent and overwhelming testimony of the Company’s witnesses (including Company statutory supervisors called by the CGC) and documentation and recordings introduced into evidence at the hearing. The Amended Complaint should be dismissed, with prejudice.

II. THE PARTIES

FMBI operates a large open-pit copper mining and hydrometallurgical operation in Bagdad, Arizona. Tr 37-38

Charging Party Tartaglia was hired by FMBI in 2011 as a Haul Truck Driver. Tr 324 He held the positions of Haul Truck Driver I and Shovel Operator I during his employment with the Company until his discharge on February 21, 2020. He filed unfair labor practice charges with the National Labor Relations Board (“NLRB” or “the Board”) alleging that FMBI interfered with his rights under Section 7 of the National Labor Relations Act (the “Act”).

III. STATEMENT OF THE CASE

This matter was filed by the GC on behalf of the Charging Party. In the Amended Complaint¹ the GC contends that FMBI violated Section 8(a)(1) and 8(a)(4) of the Act in two distinct, but related, ways. One the GC alleges that “[on] February 21, 2020, Respondent, by JP LaFon, in writing, threatened its employees with discharge for filing charges with the Board” in violation of Section 8(a)(1) of the Act. Amended Complaint, ¶¶ 4 and 6. (emphasis added) Two, the GC alleges that also on February 21 2020 – and simultaneously with creating the aforementioned alleged written “threat” – FMBI discharged Tartaglia “because [he] filed charges with the Board, cooperated in the Board’s investigation of those charges, and threatened to file a charge with the Board”, in violation of Section 8(a)(4) of the Act. Amended Complaint, ¶¶ 5(a), 5(b) and 7. In other words, the GC is making the incongruous allegation that while FMBI was discharging Tartaglia, it simultaneously threatened Tartaglia with discharge. Not only did the GC fail to prove the claims alleged in the Amended Complaint, the evidence at the hearing was

¹ The Amended Complaint made no substantive changes. It corrected Charging Party’s name, added Haris Kudadiri as a supervisor and corrected Steve Rusinski’s title.

compelling that FMBI did not commit any of the unfair labor practices alleged in the GC's Amended Complaint.

IV. STATEMENT OF FACTS

A. Company Policies and Procedures

FMBI has policies and procedures regarding its expectations of performance and conduct, safety, progressive counseling and grievance processes. Among other places, these policies are included in the Company's Guiding Principles ("GP") (R Exh 1) and Principles of Business Conduct ("PBC") (R Exh 3). (Tartaglia received both the GP and PBC. *See* R Exhs 2 and 4.)

1. The Company's Core Values

The Company's Core Values are the foundation for how it conducts business: Safety, Respect, Integrity, Excellence and Commitment to Sustainability (of the environment and communities in which it works). R Exh 1 at pp. 2-3; R Exh 3 at p. 1. The Core Value of Integrity provides,

Integrity

We are committed to holding ourselves accountable for everything we do. We accept personal responsibility for all of our actions and decisions. We are honest and transparent and uphold the highest standards in the work we perform. We communicate openly and accurately and do what we say we are going to do.

R Exh 1 at p 2.

2. Guiding Principles (GP)

The Company's GP set forth Expectations of Performance and Conduct that includes standards by which all employees must abide, including (1) "living up to the [GP]", (2) "following safety rules and ... safety practices", and "adhering to the Principles of Business Conduct. *See* R Exh 1 at p. 23. The GP also contain a list actions that warrant immediate discharge, including "Violation or disregard of the [PBC]" and "refusal to cooperate in an investigation or concealing / misrepresenting materials facts". *Id.* at p. 23-24. (emphasis added)

The GP also set out the Company's Progressive Counseling process, which includes the following steps: (1) 1st Written Counseling; (2) 2nd Written Counseling; (3) Final Warning Counseling with or without unpaid suspension; and (4) Discharge. *Id.* at p. 24.

3. Principles of Business Conduct (PBC)

As mentioned above, the GP require that employees "[adhere] to the Principles of Business Conduct." The PBC (R Exh 3) is a set of policies and standards reflecting the Company's culture and expectations of ethical and legal conduct by all employees. With respect to investigations, the PBC makes it crystal clear that,

[employees] are expected to cooperate fully, and be truthful, honest and forthright. Failure to do so may result in disciplinary action up to and including termination of employment.

Id. at p. 41.

4. Safety – Haul Truck Passing Procedures

FMBI is committed to safety. R. Exh 1, p. 2; R Exh 3, pp. 3, 8-9. Standard Operating Procedure MOP083 – Passing Procedures for Haul Trucks ("SOP MOP083") (R Exh 49²) – is one of the rules in place to ensure safety in the workplace. SOP MOP083 forbids a driver from passing another piece of equipment without first receiving express permission to do so from the driver of the vehicle to be passed. *Id.* SOP MOP083 applies to any piece of equipment from a haul truck to any piece of equipment. Tr 76-77 Simply making contact with the driver of the equipment does not satisfy the safety rule on passing; express permission to pass must be received. For example, if one driver asks an equipment operator for permission to pass, and the equipment operator who

² R Exh 49 is a copy of SOP MOP083 with Tartaglia's acknowledgement of receipt dated 8/27/18. R Exh 6 also is a copy of SOP MOP083 but without with Tartaglia's acknowledgement of receipt. FMBI will refer throughout this Post-Hearing Brief to R Exh 49.

is being asked for permission to pass does not respond, passing is prohibited and the driver requesting to pass must stay behind. Tr 78-79 Tartaglia received SOP MOP083 *See id.*

B. Tartaglia's Position / The 2017 Discharge / Reinstatement Issues

1. Tartaglia's 2017 Discharge and Reinstatement in 2018

In 2011 Tartaglia was hired as a Haul Truck Driver at FMBI. Tr 324 In October 2017 Tartaglia was discharged. He appealed his discharge through FMBI's Problem Solving Procedure ("PSP"). At Step 4 of the PSP, American Arbitration Association ("AAA") Arbitrator Louis Zigman issued a Decision and Award reinstating Tartaglia to the position he held at the time of termination ("2018 Decision and Award"). Tr 713-714

2. Tartaglia Was a Shovel Operator

Tartaglia testified he held the position of Rubber Tire Dozer ("RTD") operator (Tr 324) and that when he was reinstated he was returned to a RTD position. Tr 463 Tartaglia was wrong. There is no such position or job classification at FMBI of RTD operator. Tr 58-60; 712 The operation of a RTD is a task assignment only, and is performed by employees in the position of Truck Driver or Shovel Operator who cross-train on a RTD. *Id.*

Prior to his discharge in 2017, Tartaglia submitted a competitive bid for (*i.e.*, applied for) a Shovel Operator position. His application was granted and his job title was changed from Truck Driver to Shovel Operator I shortly before his termination in 2017. Tr 713 Accordingly, although Tartaglia had not yet been trained as a Shovel Operator I, when Tartaglia was reinstated pursuant to the 2018 Decision and Award, Tartaglia was reinstated as a Shovel Operator I. Tr 713-714

3. Post-Reinstatement Dispute: Tartaglia Wrongly Contends He Was Not Properly Paid

In the 2018 Decision and Award, Arbitrator Zigman directed that Tartaglia be reimbursed for his lost wages and benefits, less interim earnings. R. Exh 52, p. 2 FMBI made the required

back pay payments to Tartaglia. *Id.* Tartaglia, however, contended the Company did not make full and complete payment. *Id.*; *see also* Tr 329

Arbitrator Zigman had retained jurisdiction over the case in the event of any issues over the remedy. Accordingly, at the parties request, on November 14, 2019, Arbitrator Zigman conducted a hearing regarding the disagreement over the Company's implementation of his 2018 Decision and Award. R. Exh 52, p. 2 The parties presented evidence and examined witnesses and were given the opportunity to file closing briefs. *Id.*

On January 16, 2020, Arbitrator Zigman issued his Decision and Award in the post-reinstatement dispute regarding the implementation of his 2018 Decision and Award, stating in relevant part:

After considering the evidence and the contentions of the parties, I found that the weight of the evidence, preponderant evidence, supports the Company's position.

* * * * *

I found [the Company's] explanation of how the back pay, including the different elements that [it] described was consistent with that part of my remedial order.

* * * * *

Another difficulty with regard to the reliability of Mr. Tartaglia's testimony is that it was based on speculation, supposition and simply uncorroborated opinion....

* * * * *

The Company has satisfied the conditions in my remedial order. Mr. Tartaglia is not entitled to any additional remedy.

Id., at pp. 6-6

C. Tartaglia Receives a Final Warning For Refusing to Attend Required Training

1. Tartaglia Refuses Assigned Work of Attending Required Training

To be a Shovel Operator, Tartaglia had to complete the required training on the shovel. Tr 714 Therefore, after his reinstatement to the position of Shovel Operator pursuant to the 2018 Decision and Award he started training on the shovel in October or November 2018, but then

claimed it was hard to train on the shovel when he had “these issues that are hanging over my head.” GC Exh 3 He stated he was not refusing training, only delaying training until the issues with FMBI were resolved. *Id.* FMBI granted Tartaglia a temporary delay.

After delaying his training for nearly three months (Tr 465) Tommy O'Neill (“O’Neill”), Senior Supervisor (Tr 35), met with Tartaglia on February 22, 2019 in the presence of David Fendrich, Senior HR Generalist (Tr 625) (“Fendrich”). GC Exh 23; Tr 715-716 Because Tartaglia was required to complete the training on the shovel in order to be a Shovel Operator or, alternatively, to get re-qualified as a truck driver if he wanted go back to his prior position as a Truck Driver (Tr 66), O’Neill gave Tartaglia two options: (1) complete his Shovel Operator training so he could perform the job of a Shovel Operator, or (2) laterally transfer with no change in pay to a Truck Driver position and be re-trained on the haul truck, where he could then also perform assignments on the rubber tire dozer. Tr 715-716 O’Neill told Tartaglia if he didn’t choose either option, the Company would move forward with Option 2, which was the lateral transfer to the Truck Driver position. *Id.* Contrary to what Tartaglia testified, this was not a demotion; it was a lateral move with no loss of pay. *Id.*

When, as of March 22, 2019, Tartaglia had not selected an option (Tr 714-715) O’Neill wrote to Tartaglia, restated the two options he had proffered on February 22, 2019 and advised him if he did not “give [his] *unqualified* decision to David Fendrich or myself *in writing* no later than 5:00pm on March 31, 2019 ... we will assume that you have selected Option 2 and proceed accordingly.” R Exh 53 When, as of March 31, Tartaglia still had not selected an option (Tr 467-470) O’Neill notified Tartaglia that because he never responded to the requests that he select his preferred option, Tartaglia had been “enrolled into truck driver training class on 4/1/19.” GC Exh

At 6:39 p.m. on March 31, 2019, the evening before he was to attend truck driver training as his work assignment, Tartaglia sent Fendrich an email stating he was refusing to attend training:

... I made it clear to you that Im not up for any training. I have a hearing that's coming up a Deposition as well investigations. Still Stands. It was made clear to you when you handed me that letter. Im on the [RTD] and will stay there until everything is resolved. First things First. Still Stands. Final Response. GC Exh 5

On April 1, 2019, the day he was instructed to start haul truck training as his work assignment, Tartaglia told Steve Rusinski (“Rusinski”) he was refusing the instruction that he start the training that day adding that he had a lot of things going on with the Company. GC Exh 19, p. 1. Interestingly, although he said he was refusing to perform his work assignment of attending training that day, he was at work and could have attended the training, which was during his regular work hours. Tr 469; 471

2. Tartaglia Is Placed on IWP and Receives a Final Warning

Because Tartaglia refused his work assignment of attending the required haul truck training as directed by his superiors, Rusinski told Tartaglia he was being placed on Investigative Leave With Pay (“IWP”)³ (*id.*; *see also* Tr 169), and Tartaglia was placed on IWP that day. *Id.* at p. 2.

On April 11, 2019, Tartaglia received a Final Warning for refusal to do assigned work of attending required haul truck training, and he was notified he would be enrolled in the next available truck driver training class. GC Exh 18 states, *inter alia*,

When instructed on 3/31 to report to truck driver training on 4/1, you told your supervisor that you would not attend the class. On 4/1, when you were instructed the truck driver training was your assigned work, you again refused to attend, stating “I am not up for no training”. This is a violation of the Company's Guiding Principles, actions “considered serious in nature and may result in immediate discharge”, “Refusal to do assigned work...”.

³ An employee may be placed on IWP when the employee is involved in an investigation. R Exh 1 at p. 11. It “... does not mean that [the employee has] engaged in any inappropriate activity.”

Tartaglia's Final Warning is very relevant to the events that eventually led to his discharge on February 21, 2020 and, thus, to this case. That is because a Final Warning remains active for 365 days (R Exh 1 at p. 24) and is the last step of the progressive counseling process before termination of employment, thus, a further violation of the GP while on the Final Warning may lead to discharge. R Exh 1, at p. 24.

3. Tartaglia Appeals the Final Warning / Files A Charge With NLRB

After receiving the Final Warning Tartaglia both filed a charge with the NLRB on May 8, 2019 (28-CA-241240) (Joint Exh 6 5/8/19; Tr 347) and appealed the discipline through the PSP. Tr 347-348

a. The Problem Solving Procedure

(1) *Tartaglia Rejects a Lesser Form of Discipline*

In his opening statement, the CGC represented to the ALJ that the Company had “reneg[ed] on a promise to reduce the [Final Warning] to a written counseling.” Tr 21 The CGC's representation was incorrect.

As the evidence established, Tartaglia declined the offer to reduce the Final Warning to a lesser discipline. At Step 3 of the PSP regarding Tartaglia's Final Warning, Erich Bowers, the General Manager at Tyrone, New Mexico – a different site than Bagdad — advised Tartaglia he was “reducing [Tartaglia's] discipline to a Second Written Counseling for [his] refusal to do assigned work.” GC Exh 8 Tartaglia rejected Bowers' offer to reduce his discipline to a Second Written Counseling and, instead, opted to appeal his grievance regarding the Final Warning to the next step of the PSP – Step 4, binding arbitration. Tr 351; R Exh 1, p. 6

(2) *Arbitrator Upholds Final Warning At Step 4 of the PSP*

Having rejected FMBI's lesser discipline of a Second Written Counseling, Tartaglia proceeded to Step 4 of the PSP, arbitration. He was presented with a list of arbitrators provided

by AAA to select from; he again chose Arbitrator Zigman from the list of arbitrators. Tr 360-361

On November 15, 2019, Arbitrator Zigman held a hearing at which time the issue was whether “the Company [had] good cause to issue a Final Written Counseling to Pete Tartaglia, on April 11, 2019.” R. Exh 11, p. 2 At the hearing the parties presented evidence and examined witnesses. After the hearing the parties filed written closing briefs. *Id.*

On January 15, 2020 Arbitrator Zigman issued his Decision and Award in which he “... conclude[d] that the Company had good cause for the issuance of the Final Written Counseling [and] [a]ccordingly, the corrective/disciplinary action is sustained and the Problem Solving Complaint is dismissed.” *Id.* at p. 17. While, of course, not binding on the ALJ in this case, Arbitrator Zigman’s analysis in reaching his conclusion is relevant and helpful. In that analysis, Arbitrator Zigman stated in relevant part:

... I find that the evidence clearly demonstrates that Tartaglia was told on numerous occasions by various supervisory personnel that it wanted [him] to attend training either for the Shovel Operator position, a position which Tartaglia clearly asked to be transferred to or on the Haul Truck. When Tartaglia initially stated that he wasn't up for it because of concerns he still had over outside litigation, the Company acquiesced.

As time went on, Tartaglia was again reminded about the need to have him trained and he continued to “decline.” Similar conversations continued over a period of months until the March 22, 2019 meeting between Mr. O'Neill, Mr. Fendrich and Tartaglia. By that time, it cannot be denied that Tartaglia was aware that the Company wanted him to begin training - one way or another - by the instruction to him that he would have to choose between options 1 or 2 by 5:00 p.m. on March 31 - or else - the Company would choose it for him.

The evidence is also undenied that Tartaglia made no selection as of 5:00 p.m. on March 31st [2019]. The evidence is also undenied that on the following work day when Tartaglia reported for work, he was told to report for classroom training. Once again, he voiced his displeasure and he did not report for training.

At that point, the Company representatives placed him on a paid investigatory leave. After the investigation was completed, Company supervision concluded that Tartaglia's conduct constituted a refusal to

participate in training and therefore that corrective/disciplinary action was required.

* * * *

While Tartaglia asserts that he was not aware that he might be disciplined for his failure to select one of the two options, his testimony and explanations is simply not credible. It is not credible because he was well aware of the many months' long attempt by the Company to have him begin training.

Further, as the Company pointed out, the direction to participate in training is a valid one and the fact is that Tartaglia himself has participated in Company training as recently as just after his reinstatement to work.

The fact that the Company did not specifically order Tartaglia to begin training and that it acquiesced several times, essentially showed good faith on the Company's part. After all, the Company wanted him to be trained in the lateral transfer shovel operator position that he requested. And when faced with Tartaglia's consistent "reluctance" to become a shovel operator, the Company suggested an alternative by working as a haul truck operator at the same rate of pay.

And finally, I found the Company's contention that Tartaglia's explanation – "not up for any training" – and his failure to comply with the March 22nd [2019] directive did constitute his refusal.

* * * *

In terms of the severity of the corrective action – Final Written Counseling – that discipline did not constitute an abuse of the Company's discretion nor arbitrary action on its part.

Id. at pp. 13-17

(3) *The NLRB Upholds the Final Warning and Dismisses the Complaint*

On May 29, 2020, the Board dismissed Tartaglia's charge number 28-CA-241240, upholding the Company's act of placing Tartaglia on a Final Warning:

Regarding the Employer's requirement that you attend training, evidence shows that the Employer had a legitimate reason for requiring the training based on its obligation to comply with regulations pertaining to operating heavy equipment and maintaining workplace safety. Regarding suspending and disciplining you for not attending the required training, the Employer was not obligated to accommodate your desire to focus on your personal schedule related to your pursuit of claims against the Employer. Finally, regarding the Employer's referring you to a

fitness for duty examination, evidence shows that the referral was in response to concerns you raised that circumstances were affecting your health and causing unsafe working conditions.

See R Exh 12

D. Tartaglia Violates The Company's Safety Rule On Passing

Shortly after 9:09 a.m. on February 5, 2020, Tartaglia violated the safety rule on passing procedures (SOP MOP083 (R Exh 49)) – when he drove Haul Truck 129 (“HT129”) around Production Drill AC14 (“AC14”) after his request for permission to pass was expressly denied. Although Tartaglia later claimed Ron Eisner (“Eisner”), the operator of AC14, cleared him to pass, FMBI concluded that Tartaglia’s claim was untruthful as it was refuted by Eisner, at least two (2) other witnesses to the conversation between Tartaglia and Eisner, and a recording of the radio communications between Tartaglia and Eisner that showed that Eisner denied Tartaglia’s request for permission pass.

1. Eisner Denied Tartaglia's Request For Permission To Pass

On February 5, 2020, Eisner was operating AC14 with drill trainee Montana Covey Warner present with him. Tr. 405-406 Between 9 – 9:15 a.m., Eisner began moving AC14 to the next drill pattern. Before moving he gave a safety alert announcing AC14’s location to let everybody in the area know there would be a slow-moving drill in the haul road and to watch out. Tr 410 The safety alert was given because when the drill is moving its 87 foot long mast is put down into a horizontal position and it poses a risk of danger to other operators and equipment. Tr 409 When the mast is horizontal it is almost exactly the height of the cab of the haul truck. *Id.*

After moving the drill into the haul road, a haul truck passed AC14, which Eisner saw was HT129 after it went passed, and he later learned HT129 was driven by Tartaglia. Tr 411 The first communication Eisner received from Tartaglia before he passed AC14, was when “129 called me and said AC14 on your right.” *Id.*; *see also* R Exh 14 (recording of radio transmissions); R Exhs

15 and 16 (transcriptions of radio transmissions without and with speakers identified, respectively.) Eisner immediately answered Tartaglia and denied his request for permission to pass. (“No, stay behind please.”) *Id.*

During the hearing in this case, Eisner listened to the recording of radio communications between him and Tartaglia (R. Exh 14), including the following exchange, which irrefutably shows that Eisner denied Tartaglia’s request for permission to pass, including the following exchange:

[Tartaglia to Eisner] AC14, around your right side
[Eisner to Tartaglia] No, stay behind please

Eisner testified that that recording (R Exh 14) accurately represents the exchange between Tartaglia and him. Tr 412-413

a. Eisner did not spontaneously invite Tartaglia to pass

At the hearing, and in response to the ALJ’s question, Tartaglia testified that Eisner, unsolicited, invited him to pass before he (Tartaglia) even requested permission to pass:

JUDGE TRACY: Okay. And so tell me again what happened?

THE WITNESS: I’m a loaded truck, I’m leaving the shovel, I’m headed to the dump. And I’m coming across that flat. And Ron says that truck coming, you’re clear to come around. And then I just wanted to let him know, okay, on your right side, on your right side, so he acknowledges that I’m coming. And then he came back, and it was his voice, and he says, oh, sorry, I couldn’t get on the radio. But he had already cleared me to come around.

JUDGE TRACY: Okay. So it’s your testimony that he cleared you -- Mr. Eisner cleared you to pass him before you even requested to pass him?

THE WITNESS: Yes.

Tr 375-376 (emphasis added)

Eisner refuted Tartaglia’s story. Prior to the call from Tartaglia saying “AC14 around your right”, there was no communication from or to HT129. Tr 411 Eisner testified unequivocally that before HT129 called out to him and said AC14 on your right, he (Eisner) did not communicate

with any truck on his own initiative saying something to the effect of, “hey loaded truck, come on around.” Tr 412 Further evidence that Eisner did not spontaneously invite Tartaglia to pass before Tartaglia requested permission to pass was shown in the testimony of Montana Covey and the recordings contained in R Exhs 55, 56 and 57. Those recordings show that in the four (4) minutes (9:05:45 to 9:09:25 a.m.) preceding the radio exchange between Tartaglia and Eisner, Eisner never called to Tartaglia (or any other truck) to spontaneously invite him to pass. *Id.*

b. Eisner denied permission because of the danger

Eisner explained that he denied Tartaglia permission to pass because he was about to turn the drill into a wide spot of the road towards the left, which made AC14’s 87 foot mast swing into the haul road. Eisner did not want anybody even close to the drill because “the mast spins out and I did not want anybody to run into the mast or hit anybody.” Tr 413

When Tartaglia passed AC14 Eisner saw in the camera that HT129 was so close he had to stop AC14 immediately because he feared the drill’s mast was going to slam into Tartaglia’s cab. Tr 413 Eisner’s quick reaction and experience avoided the collision. R. Exh 18

2. Montana Covey Warner

On February 5, 2020, Montana Covey Warner (“Covey”)⁴ was a drill trainee, riding in the cab of AC14 with Eisner. Tr 559 When they were on the haul road moving AC14, a truck that did not identify himself called and asked to pass on the right, saying “AC14, can I come around your right?” Tr 561 Eisner responded immediately, “no, please hold back.” *Id.*; *see also* Tr 574 The truck then passed AC14 on the right without permission, causing the entire drill to wobble and shake when it passed, and they had to stop the drill. Tr 561 Once the truck passed, Covey could

⁴ Although she is now known as Montana Covey Warner after her recent marriage, FMBI will refer to her as “Covey”, her name during the time relevant to this case, for reasons that include the fact that any exhibits related to her showed the name “Covey”.

see it was HT129. Tr 562 Before HT129 asked AC14 for permission to pass on the right, Covey is certain Eisner did not spontaneously announce, “loaded truck, come on past us”. Tr 562

3. Ken Potter

Ken Potter (“Potter”) was operating Grader 24⁵ on the morning of February 5, 2020. Tr 580 He witnessed the incident where HT129 passed AC14 on the haul road after leaving one of the shovel pits on the northeast side of the pit. Tr 580

When Eisner broadcast his safety alert that AC14 would be moving onto the haul road, Potter pulled off the road into a position across the road from and facing AC14. Tr 583-584 As AC14 was approaching Potter’s location, Tartaglia, who was driving HT129, called and asked for permission to go around the right, saying something like “AC14, on your right please.” Tr 585-586 Eisner in AC14 responded to Tartaglia saying, “No, stay behind, please”, and after that HT129 proceeded to go around by saying, “coming around your right”, and passed AC14. Tr 586

During the hearing in this case, Potter listened to the recording of radio communications between Eisner and Tartaglia (R. Exh 14), including the following exchange:

[Tartaglia to Eisner]	AC14, around your right side
[Eisner to Tartaglia]	No, stay behind please

See also, R Exhs 15 and 16.

Potter confirmed that that recording (R Exh 14) is an accurate recording of the communications over the radio between Tartaglia and Eisner that he described earlier in his testimony. Tr 587

⁵ In Covey’s Witness Statement (R Exh 19) she mistakenly identified the grader that was in the vicinity at the time of the passing as Grader 25. Potter confirmed he was on Grader 24 (Tr 581:24 – 582:1) and if anybody said he was on Grader 25 they would not be correct. Tr 581:24 – 582:1 In fact, Grader 25 was on the other side of the pit from Grader 24. Graders work based on zones, and don’t normally work in the same area. They go their separate ways in the beginning of the shift. Tr 582 Tartaglia also confirmed that it was Grader 24, not 25, that was present. Tr 509

4. The Radio Recording – Eisner Denied Tartaglia’s Request For Permission To Pass

The Company uses the Eventide NexLog System to capture and store anything operators of equipment in the mine broadcast over the Company’s two-way radio system. Tr 627 The recording from the Eventide System of the exchange between Tartaglia and Eisner on February 5, 2020 (R Exh 14), irrefutably shows that Eisner denied Tartaglia’s request for permission to pass:

[John Boyer]	Shovel 8, single to the right, single to the right, shovel 8.
[Matthew Roderick]	Grader 25, 203 coming up on your left.
[Corey Tham]	Come on.
[Tartaglia to Eisner]	AC14, around your right side
[Eisner to Tartaglia]	No, stay behind please
[Eisner to Southwest]	Sorry Southwest, could not get on the radio ⁶
[Tartaglia to Eisner]	AC14, around your right side
[Potter to Tartaglia]	He said stay behind
[Eisner to Potter]	Well, actually, I said please stay behind AC14 but it’s too late now
[Potter to Eisner]	He just trashed the tires on the windrow

See R Exh 14 (recording); *see also* R Exh 16 and 15 (transcripts of the recording in Exh 14).

The above recording (R Exh 14) began at 9:09:25 a.m. and continued for 1 minute and 53 seconds. R. Exh 17 (screen shot of Eventide recording files); Tr 629-630 Fendrich compared the recording, R Exh 14, with the original on the Eventide System, and R Exh 14 is a complete, accurate, unaltered reproduction of the original recording on the Eventide system – “[i]t is exactly the same.” Tr 639-640

E. Failure to Freeze The Scene – Eisner, Covey and Potter Receive Coaching

When an incident occurs, employees who are involved or who witness the incident are supposed to lock down the scene and notify a supervisor or dispatch so it can be investigated? Tr

⁶ Eisner’s communication to “Southwest” was in response to Southwest’s request to pass that was made 18 seconds before Tartaglia requested permission to pass. *See* R. Exhs 14, 55, 56 and 57.

80-81 When an incident occurs and the scene isn't frozen, the involved persons are subject to discipline. Tr 82

Eisner, Covey and Potter all forthrightly admitted they did not freeze the scene – although all of them had different reasons. Eisner was trying to protect Tartaglia. As he testified, HT129 had already passed, and

I'm not a snitch. So I did not want to get anybody into trouble. And the next day we had our annual MSHA refresher. My plan was to find out who was the driver of 129 and I knew I would see him the next day at the MSHA refresher. And I wanted to have a talk with him to show him how dangerous that was. So I tried to avoid to involve any bosses or anybody. I didn't want anybody to get into trouble. Tr 425

Covey simply did not take responsibility to freeze the scene. Tr 570 And Potter did not report the incident to the supervisor because he thought Eisner had reported it. But when he mentioned the incident to Rusinski, he discovered that Eisner had not reported it and his comment ended up being the catalyst for the investigation into Tartaglia's violation of SOP MOP083 (R Exh 49), which resulted in a near miss. Tr 600

Eisner, Covey and Potter were truthful about the circumstances surrounding the event and took responsibility for their mistake. As a result of their truthfulness and acceptance of responsibility for the mistake, Eisner, Covey and Potter all received Coaching and Feedback for "Safety". Each of them accepted the Coaching and Feedback and did not appeal it. Tr 425-426; 573; 599

F. Tartaglia Is Placed On IWP / The February 13, 2020 Meeting

1. Tartaglia is Placed on IWP

In his opening, the CGC represented that "[Tartaglia] was marched into the Mine Operations office to be interrogated." Tr 23 That statement was hyperbole and not correct. In fact, when Rusinski contacted Tartaglia about the incident and obtained Tartaglia's first statement

(GC Exh 20), Tartaglia asked Rusinski if he could speak with Chuck Stevens (“Stevens”), a senior supervisor. Tr 369 Based on that request JP LaFon drove Tartaglia to Stevens office (Tr 370), where Tartaglia met with Stevens. No one else was present and the door was closed. Tr 605 Tartaglia told Stevens he got permission to pass AC14. Tr 606 Stevens asked Tartaglia to write a second statement with a little bit more detail. *Id.*; GC Exh 16 Stevens then placed Tartaglia on IWP. (*See* fn 2, *supra.* describing IWP)

During the meeting with Stevens Tartaglia also said there was another truck that passed AC14, so Stevens directed a supervisor to get the information from dispatch. A supervisor subsequently reported back that there was no truck within 10 to 15 minutes of Tartaglia’s passing AC14. Tr 608-609

2. The February 13, 2020 Meeting

On February 13, 2020, O’Neill, Rusinski and Dustin Mikes (“Mikes”), Senior HR Generalist (Tr. 204) met with Tartaglia. (the “February 13th meeting”) Prior to the February 13th meeting they had listened to the recording (R Exh 14) and reviewed the witness statements of Tartaglia (GC Exhs 20 and 16), Eisner (R Exh 18), Covey (R Exh 19) and Potter (R Exh 20) Tr 92-93 Having listened to the recording and having read the statements O’Neill found Tartaglia’s recitation of events dishonest. Tr 120 Therefore, the purpose of the meeting was to let Tartaglia listen to the recording and correct his account of what took place on February 5, 2020. Tr 119 It was not O’Neill’s intent to have Tartaglia say anything that was not true. Tr 121

O’Neill assumed going into the meeting that after Tartaglia listened to the recording, it would refresh his memory and he would correct his statement, and on that assumption, O’Neill was prepared to give Tartaglia a Coaching and Feedback for the passing violation and let him go back to work. Tr 120 For that reason, and similar to action that had been or was to be given to Eisner, Covey and Potter, prior to the February 13th meeting a non-verbal written coaching had

been prepared to give to Tartaglia, with which O'Neill agreed. Tr 93 No other discipline was prepared prior to the February 13th meeting. Tr 95 However, at the February 13th meeting:

- Tartaglia doubled down on his claim that Eisner granted his request for permission to pass AC14. Tr 99
- Tartaglia accused another truck of passing AC14 before he did without making contact. *Id.*
- Tartaglia claimed the recording that was played at the meeting (R Exh 14) was tampered with by Mikes (Tr 99) and that Mikes had tampered with the investigation. Tr 100
- When asked if, having listened to the recording, he wanted to fill out another statement Tartaglia said he did not, again insisting Eisner granted his request for permission to pass. Tr 100-101

After the February 13th meeting O'Neill changed his mind from believing a coaching was appropriate to believing discharge was applicable because of O'Neill's determination that Tartaglia repeatedly had not been honest about what had taken place. Tr 125 The recording of the exchange between Tartaglia and Eisner played a role in O'Neill's thinking. Tr 121 O'Neill testified that Exh R Ex 14 is the recording he listened to when he changed his mind to believing discharge, rather than coaching, was the appropriate next disciplinary step. Tr 122 O'Neill determined that Tartaglia did not accept responsibility for his violation of SOP MOP083 (R Exh 49) and was not honest when participating in the investigation of his violation of SOP MOP083 (R Exh 49). Tr 130-131

G. Haris Kudadiri Makes The Decision to Discharge Tartaglia

Haris Kudadiri ("Kudir") was Bagdad Mine Operations Superintendent from December 2018 until July 2021. Tr 302-303 Kudir made the decision to discharge Tartaglia. Tr 310; Tr 312

Kudir knew that before the February 13th meeting the intent was to issue Tartaglia a non-disciplinary coaching. Tr. 311 But after he read the witness statements, Tartaglia's statements, listened to the recording (Tr. 319) and learned about what happened at the February 13th meeting, he decided that Tartaglia (who was on a Final Warning) engaged in actions that were not aligned

with the Company's Principle of Business Conduct and Guiding Principles. Tr 313-314 Kudir did not write the Discharge Notice (GC Exh 14), but he gave input into it, reviewed it before it was issued (Tr 315) and agreed with it. Tr 311⁷ He was not aware Tartaglia filed charges with the NLRB – “never heard that before”. Tr. 305

H. The February 21, 2020 Discharge Meeting

JP LaFon (“LaFon”) is a Mine Operations Supervisor at FMBI. Tr 268-269 In February 2020 he was Tartaglia's supervisor. Tr 272

LaFon went on vacation on February 6, 2020 (the day after Tartaglia's violation of SOP MOP083 (R Exh 49)) and did not return to work until February 21, 2020. Tr 273 Upon reporting to work that day he was told to report to HR and get Tartaglia's termination notice. 274 Fendrich gave LaFon the termination notice and LaFon read it before giving it to Tartaglia. Tr 275

On February 21, 2020, LaFon and Mikes met with Tartaglia. LaFon read the termination notice word-for-word to Tartaglia, then handed him a copy of the termination notice. GC Exh 12; Tr 276 Tartaglia then signed a copy of the termination notice and wrote something on it. Tr 276-277 LaFon did not say anything else to Tartaglia. Tr 277 Tartaglia did not tell LaFon he was on notice, but he said this to Mikes several times. *Id.* As he was going out the door Tartaglia said he was turning this over to a federal agency, but did not identify the NLRB as that agency. *Id.*

I. LaFon Did Not Threaten Employees

Paragraph 4 of the GC's Complaint alleges that “[a]bout February 21, 2020, Respondent, by JP LaFon, in writing, threatened its employees with discharge for filing charges with the Board”. This

⁷ Mikes' role in the Tartaglia matter was to help investigate the events and then coordinate between all related parties and educate them on the PBC. Tr 312 In Tartaglia's case, Mikes' wrote the documentation and delivered it. Tr 312-313 Mikes presented the investigation file to Kudir. He did not give his opinion about what Kudir should do. He told him the facts of what happened from the investigation and during the February 13th meeting, including the emails afterward. Tr 318 Then Kudir made the decision to terminate. Tr 319

allegation is without merit for multiple reasons. One, LaFon did not make a threat. Tr 283-284 Two, he did not write the termination notice dated February 21, 2020. Three, there is nothing in the termination document that constitutes a threat by him to employees at FMBI that they will be discharged if they filed charges with the Board. Tr 285 And, four, he has never threatened any employee individually or a group of employees with discharge if they file a charge with the Board. *Id.*

J. Tartaglia Appeals His Discharge / The Discharge is Upheld

1. At Step 2 Tartaglia Is Offered And Refused to Take the Evidence File

On February 29, 2020, Tartaglia appealed his discharge through the PSP. Tartaglia asked that his PSP Step 2 meeting⁸ be delayed until after March 16, 2020, and the Company granted his request. R Exh 42 On March 17, 2020, Tartaglia had his PSP Step 2 meeting with Steve Schaefer (“Schaefer”), Manager Mine. *Id.*

Mikes attended the meeting and had available the evidence file that Tartaglia had requested (e.g., radio recordings and all documents that were applicable to the events on February 5, 2020, and the February 13th meeting). When Mikes sought to give Tartaglia the evidence file, Tartaglia refused it. *Id.* See also Tr 499-500

Notwithstanding four requests by Schaefer, Tartaglia repeatedly refused to provide any statements or other evidence in support of his position challenging his discharge. *Id.* As a result of a lack of evidence from Tartaglia, Schaefer upheld the discharge. *Id.*

2. Step 3 of the PSP

After Tartaglia’s discharge was upheld at Step 2, Tartaglia requested that his Step 3 review be handled by a manager from Colorado. R Exh 43 The Company granted the request and Vicki Seppala

⁸ In case of discharge, Step 1 of the PSP is omitted and the employee’s complaint is presented directly to the division/department Manager in accordance with Step 2. R Exh 1 at p. 5

(“Seppala”), General Manager of the Climax Mine in Colorado, met with Tartaglia. GC Exh 15

Seppala met with Tartaglia telephonically for one hour on April 9, 2020. *Id.* During that meeting, Tartaglia gave Seppala a different story than he gave in his statements on February 5, 2020 (GC Exhs 20 and 16), during the February 13th meeting and to the ALJ at the hearing in this case. Specifically, he did not tell Seppala that Eisner spontaneously invited him to pass before he requested permission to pass. Rather, he told Seppala that “the drill operator was clearing several trucks, of which [Tartaglia] was one.” *Id.*

Following their meeting, Seppala conducted a thorough investigation, reviewing all witness statements and other investigation documents; listening to the two-hour radio recordings from approximately 7:30 am to 9:30 am on February 5, 2020 and conducted one-on-one interviews with various persons involved in this incident as well as experts about the radio recording process. *Id.*

In her Step 3 letter to Tartaglia, Seppala noted to Tartaglia:

- you repeatedly told me that you contacted the drill in question and received permission to pass.
- At the time of the incident, the drill operator can clearly be heard twice asking you to hold back, not to pass, on the radio recordings.
- you told me that the drill operator was clearing several trucks, of which you were one.

Id.

Seppala advised Tartaglia that in the two-hour recordings [from 7:30 to 9:30 a.m.], at no time is there evidence supporting Tartaglia’s claim that he was cleared to pass AC14 or any other equipment. *Id.* She also noted that Tartaglia “provided little detail of [his] behaviors” but “shared allegations about co-workers at Bagdad”, and she reminded Tartaglia that these were not the subject of the investigation, which solely focused on the two items of termination applicable to Tartaglia, as listed in the opening paragraph of her letter. *Id.*

In the end, Seppala concluded that “[i]n view of the evidence in this case obtained in my independent review of the record and our Step III meeting, I am upholding your discharge.” *Id.*

3. Step 4 – Arbitration – The Discharge Is Upheld

Following the Step 3 response, Tartaglia opted to proceed to Step 4 – arbitration. He was provided a list of randomly selected arbitrators from AAA and he selected Arbitrator Louis Zigman to hear his case. On October 29, 2020, an arbitration hearing was held on Tartaglia’s appeal of his discharge before AAA Arbitrator Zigman (R. Exh 45). Tr 360-361 At the hearing, Tartaglia was represented by his personal labor law attorneys, Greg Sinning and Joshua Black. Both parties presented evidence and examined witnesses. After the hearing both parties submitted written briefs. *Id.*

Ultimately, Arbitrator Zigman, in relevant part found as follows:

I find and conclude that the weight of the evidence, from the four eye witnesses, along with the radio recording and the entirety of the record, demonstrates that Tartaglia was culpable of misrepresenting his responses on multiple occasions. By doing so, Tartaglia violated the aforementioned Core Values and Guiding Principles.

* * * *

Based on the foregoing I find and conclude that Tartaglia was culpable of the conduct he was accused of.

I also find and conclude that the Company had just cause to discipline Tartaglia.

* * * *

Just Cause did exist for termination.

The appeal is denied and dismissed.

Id.

K. Dustin Mikes (“Mikes”)

Tartaglia bases much of his case on his baseless, ad hominem accusations against Mikes – accusing him of tampering with evidence, including in prior investigations of Tartaglia that Mikes supposedly conducted, and being corrupt.

1. Mikes Was Not Involved in Prior Investigations of Tartaglia

Contrary to Tartaglia's baseless assertions about Mikes, until his involvement with Tartaglia's violation of SOP MOP083 (R Exh 49) on February 5, 2020, he had not previously been involved in any investigation of Tartaglia.⁹ He was not involved in the investigation that led to Tartaglia's 2017 discharge because he was not employed by FMBI at that time.

2. The February 13th Meeting

Mikes participated in the February 13th meeting with Tartaglia, O'Neill and Rusinski concerning Tartaglia's February 5, 2020 violation of SOP MOP083 (R Exh 49). Tr 220 As explained above, there was no intent for the February 13th meeting to be a termination meeting. Tr 221 Rather, O'Neill and Mikes thought Tartaglia should get a non-disciplinary coaching, similar to what other employees involved in the incident were to receive because they were honest about their mistake and accepted accountability. To that end, they had the Coaching and Feedback prepared, subject to how Tartaglia responded after hearing the recording. Tr 220

During the February 13th meeting, the recording (R Exh 14) was played. Tr 253-254 Mikes did not tamper with the recording. Tr 254 He does not know how to alter a digital recording and does not have the software necessary to try to alter a digital recording. *Id.*

Mikes did not ask Tartaglia to change the statement he already had written. Tr 222 He gave Tartaglia an opportunity to write another witness statement after he had heard the recording; Mikes did not want him to change what he had already said. *Id.*

⁹ Mikes testimony on this point was corroborated by Fendrich, who was the person involved in the prior investigations of Tartaglia: (1) the 2017 discharge; (2) the 2018 RTD matter where Fendrich absolved Tartaglia of wrongdoing; and (3) the Final Warning. Tr 680-684

However, in spite of hearing a recording that clearly showed he had been denied permission to pass, Tartaglia kept insisting Eisner gave him permission to pass AC14. Tr 222 He also accused the driver of HT203 of having been in front of him and passing AC14 without permission. *Id.*

3. The Decision To Discharge Tartaglia

Because Tartaglia had not been truthful and refused to take responsibility for his actions of violating SOP MOP083 (R Exh 49), which led to the near miss, and because Tartaglia already was on a Final Warning, O'Neill thought discharge was warranted as the next step in the Company's progressive discipline process. Tr 252-253 Mikes' role in this process was not to make the discharge decision, but to speak with senior leadership about the situation. Tr 234, 237

4. The Discharge Notice / The Discharge Notice Was Not A Threat

Mikes was part of a collaboration with HR leadership to prepare the discharge notice. Tr 237-238 The discharge notice was delivered to Tartaglia by LaFon who read it to Tartaglia word-for-word. Nowhere in that discharge document (GC Exh 14) are employees threatened with discharge if they filed a Complaint with the Board. Tr 256 In fact, Mikes has never seen a document threatening any employee or a group of employees with termination if they file a Complaint with the Board or any governmental agency. *Id.* And Mikes has never heard LaFon tell any employee or group of employees that they would be fired if they file a Complaint with the Board or any governmental agency? *Id.*

Mikes left FMBI in April 2020. Tr 204

V. ARGUMENT

A. Witness Credibility

1. The ALJ Should Credit FMBI's Witnesses Wherever the Testimony Conflicted.

Tartaglia's testimony was profoundly confused, contradictory, internally consistent and non-responsive. The Board has long recognized the factors an ALJ should consider in assessing witness credibility: the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). An ALJ may also consider corroboration and the relative reliability of conflicting witness testimony. *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed testimony).

Witness credibility is likely to be outcome determinative in this case. To determine whether FMBI violated the Act as alleged in the Amended Complaint, the ALJ will have to credit – or discredit – any conflicting testimony offered by the parties' witnesses regarding the events at issue. The factors for determining witness credibility all require that FMBI's witnesses should be credited over Tartaglia's.

The CGC called statutory supervisors O'Neill, Rusinski, Kudadiri and LaFon and former Senior HR Generalist Mikes as witnesses. Their testimony not only failed to support the CGC's case, it defeated it.

O'Neill. The CGC called O'Neill, who testified credibly and consistently about his involvement regarding Tartaglia. He cogently explained the need for Tartaglia to train on the shovel

or the truck and that he gave Tartaglia an option to choose the training in which he (Tartaglia) would participate. He explained why a Final Written was given. He forthrightly testified that going into the February 13th meeting he assumed that after Tartaglia heard the recording of the radio exchange between him and the operator of AC14 Tartaglia would realize he did not have permission to pass, would accept responsibility for his actions and revise his statement accordingly. And on that assumption, O'Neill was prepared to issue to Tartaglia a Coaching and Feedback. He was confident enough that Tartaglia would be truthful that a Coaching and Feedback was prepared before the meeting, which he agreed with. He testified why, after Tartaglia insisted on February 13, 2020 that he had received permission to pass, that he changed his mind and decided a Coaching and Feedback was no longer appropriate and that discharge was warranted. On these and all other issues, O'Neil's business-like demeanor and confident recall underscored the reliability of his testimony.

Rusinski. The CGC called Rusinski. Rusinski's involvement was limited and he did not try to fill in blanks or provide information he did not have. He testified that Tartaglia told him he was refusing training on the haul truck because he had a lot of things going on with the company and that when those were taken care of he would start training on the shovel. He testified that because of Tartaglia's refusal to begin haul truck training on April 1, 2019, Tartaglia was placed on Investigative Leave With Pay ("IWP"). He testified that the people who were involved in or witnessed Tartaglia's near miss safety violation on February 5, 2020 should have, but did not freeze the scene, and for that they were issued Coaching and Feedbacks. He testified that after he obtained Tartaglia's first witness statement, his only involvement with Tartaglia was attending the February 13th meeting with Tartaglia, O'Neill and Mikes. He testified that at that meeting he O'Neill and Mikes did not ask Tartaglia if he wanted to change his witness statement to fit the company's narrative, but because the recording clearly showed he had been denied permission to

pass. And Rusinski forthrightly admitted he began arguing with Tartaglia after Tartaglia refused to answer a question. After the February 13th meeting, Rusinski was not involved in anything to do with Tartaglia. He did not give and was not asked for any recommendation.

Mikes. The CGC called Mikes. Mikes testified credibly and consistently about his involvement regarding Tartaglia. He explained that until his involvement with Tartaglia's near miss safety violation on February 5, 2020, he had not previously been involved in any investigation of Tartaglia. He testified that before the February 13th meeting terminating Tartaglia had never come up and they were prepared to give Tartaglia a coaching depending on how he responded after hearing the recording. Mikes adamantly denied tampering with the recording (R Exh 14), testified he does not know how to alter a digital recording and does not even have software to alter a recording. Mikes testified the recording (R. Exh 14) was identical to the recording he received from the Company's IT Department. He testified that after Tartaglia had been untruthful and refused to take responsibility for his improper passing, O'Neill said that because Tartaglia was on a Final Warning, discharge was the appropriate next step in the progressive discipline process. Mikes testified that Tartaglia's situation was different than Eisner's, Covey's and Potter's because those employees were not on a Final Warning and they had been truthful. Mikes also testified that they investigated Tartaglia's allegation that the driver of HT203 passed AC14 in front of him and found that HT203 was at the bottom of the pit and nowhere near Tartaglia as he claimed.

Kudir. Kudir credibly testified he was the person who made the decision to discharge Tartaglia because while on a Final Warning he engaged in actions (being untruthful and misrepresenting material facts during an investigation into his near miss safety violation) that were inconsistent with the Company's Guiding Principles and Principles of Business Conduct, and he had no knowledge of Tartaglia's charges with the NLRB.

LaFon. LaFon also testified credibly. Because he was on vacation between February 6 – 20, 2020, and did not return to work until February 21, 2020 – the day Tartaglia was discharged – he had no involvement in the events and decisions that followed Tartaglia’s safety violation. He showed up for work on February 21, 2020, was given the discharge notice and told to deliver it to Tartaglia, which he did. LaFon did not prepare the discharge notice as alleged by the GC in the Amended Complaint at ¶ 4, but he read it and testified that he did not make a threat, there was nothing in the termination document that amounts to a threat to employees at Freeport that they will be discharged if they filed charges with the Board and he has never threatened any employee individually or a group of employees with discharge if they file a charge with the Board.

Fendrich. Fendrich testified in great detail about the Eventide Nexlog System that captures and stores communications broadcast over the Company’s two-way radio system, about retrieving recordings and to the fact that recordings in R Exhs 14, 55, 56 and 57 are complete, accurate, unaltered reproductions of the same original recordings on the Eventide system – they are “exactly the same.” He confirmed that Mikes had no role in any investigation of Tartaglia before the investigation related to Tartaglia’s near miss safety violation on February 5, 2020. He confirmed that Mikes had no ability to tamper with the recordings. And using the still map and interactive GPS exhibits (R Exhs 28 and 50) he showed that Tartaglia’s accusation that the driver of HT203 was in front of him and passed AC14 without permission was false; the GPS exhibits showed that HT203 was nowhere near Tartaglia at the time of Tartaglia’s near miss safety violation on February 5, 2020, or at any time on February 5, 2020. Fendrich also confirmed that Tartaglia’s discharge was not for passing without permission, but for failing to be honest and forthright during the investigation – not only in stating he had permission to pass when he didn’t, but also in falsely accusing another employee (the driver of HT203) of the same act of improper passing of AC14.

Fendrich also made clear that at Step 4 of the PSP (arbitration) a random list of arbitrators comes from the AAA and the employee alone selects the arbitrator; the Company has no role in creating the list and in selecting the arbitrator – “that is 100% the employee’s choice.”

Eisner, Covey and Potter. Tartaglia’s three non-supervisory co-workers – Eisner, Covey and Potter – were called by the Company and testified powerfully, credibly and consistently about what they saw and heard with regard to Tartaglia’s passing of AC14. All three employees had significant recall of the events at issue and testified in detail that (1) Tartaglia requested permission to pass AC14 (“AC14 around your right”); (2) Eisner immediately denied Tartaglia permission to pass (“No, stay behind please); and (3) in spite of being denied permission to pass, Tartaglia, driving HT129, passed AC14. Eisner definitively and credibly testified that, contrary to Tartaglia’s claim, he did not spontaneously invite Tartaglia to pass AC14. Covey, who was present in AC14 with Eisner corroborated that Eisner did not spontaneously invite Tartaglia to pass. Eisner, Covey and Potter all wrote statements on the date of Tartaglia’s violation and their testimony was consistent with those statements. Their testimony and written statements were consistent with the recording of the radio transmissions between Tartaglia and Eisner. The recording corroborates their testimony, and their testimony corroborates the recording. The record is devoid of any evidence of animus by Eisner, Covey and/or Potter toward Tartaglia and, therefore, no reason to believe they would testify untruthfully against him. In fact, Eisner testified he was trying to protect Tartaglia by not reporting the passing incident. (“I’m not a snitch. So I did not want to get anybody into trouble.”) And Eisner, Covey and Potter all three forthrightly admitted they had violated a company safety rule when they failed to “freeze the scene”, were truthful and took responsibility for their actions and accepted their discipline.

The clear testimony from these three witnesses stood in stark contrast to the not credible testimony elicited by the CGC from Tartaglia.

2. Tartaglia Lacked Credibility

Tartaglia's testimony, however, was not credible. Tartaglia's lack of credibility can be shown in a number of instances where his testimony was simply not true.

a. Tartaglia was untruthful in claiming he had permission to pass AC14

The event that was the starting point of this case, and the reason for the investigation that ultimately led to Tartaglia's discharge, occurred at approximately 9:09 a.m. on February 5, 2020. On that date and time Tartaglia was involved in a near miss because he violated Company safety rules regarding passing. While driving HT129, Tartaglia passed production drill AC14 after being expressly denied permission to pass. An investigation of Tartaglia's safety violation followed, at which point Tartaglia came to a fork in the road: he could either choose to go down the road of integrity and be honest and admit his mistake, or he could choose to go down the road of deceit and be dishonest about what happened. Tartaglia chose the path of dishonesty, which is irrefutably proven by the evidence adduced at the hearing. Tartaglia cannot blame anyone else for his decisions to violate the safety rule and then lie about it. He alone is responsible for his choices.

On February 5, 2020, during the investigation into his safety violation Tartaglia told Rusinski and Stevens he had permission to pass AC14 ("I was cleared by Drill AC14"). GC Exhs 20 and 16. During the February 13th meeting, and even after the recording was played that clearly showed Eisner denied permission to pass, Tartaglia steadfastly insisted he had permission to pass. During his April 9, 2020 PSP Step 3 meeting with Seppala, Tartaglia continued to insist he had permission to pass – telling Seppala Eisner had given a number of trucks permission to pass, and he was one of those trucks. GC Exh 15 During his testimony at the hearing in this case on January 26, 2022, Tartaglia gave the ALJ a different story than he gave Seppala, this time claiming that

Eisner spontaneously invited him to pass without Tartaglia ever asking. (“I’m coming across that flat, and [without making a request] Ron [Eisner] says that truck coming, you’re clear to come around.”) Tr 375:3 – 376:22

The testimony of Eisner, Covey and Potter, and the recordings contained in R Exhs 14, 55, 56 and 57 provided undeniable evidence that Tartaglia has been dishonest. In the face of the overwhelming evidence, Tartaglia has stood alone in his testimony that Eisner gave him permission to pass. There simply is no credible evidence supporting Tartaglia’s assertion and his testimony should be deemed not credible and disregarded in its entirety.

b. Tartaglia untruthfully alleged that HT203 passed AC14.

Tartaglia further added to his dishonesty during the investigation into his safety violation when he concocted a story where he accused a co-worker, Matthew Roderick, of violating the same safety rule Tartaglia violated. Specifically, Tartaglia claimed that just before he passed AC14 with permission from Eisner, HT203 (driven by Roderick) went around AC14 without receiving permission to pass. GC Exh 20; Tr 524:13-16; 525:19-24

Respondent’s Exhibits 48 and 28, the GPS fixed map and the GPS interactive display, respectively, showed conclusively that Tartaglia’s story about HT203 was untrue. On February 5, 2020 HT203 was in an entirely different area of the mine – nowhere close to Tartaglia and HT129. Moreover, Tartaglia’s testimony confirmed that HT203 was not in the area at the time of Tartaglia’s safety violation:

Q. BY MR. STOLKIN: Mr. Tartaglia, on the day of February 5 and the -- I’m calling it the passing incident, I know you mentioned AC14 was there, you saw Grader 24 off to the right, I think you said; is that correct?

A. Yeah, he was off -- parked off side of the road.

Q. Okay. And do you remember what other pieces of equipment were there at the time?

A. That was it.

Q. Okay AC14 and Grader 24?

A. Yes.

Tr 509

c. Tartaglia untruthfully accused Mikes of tampering with evidence and being corrupt:

Tartaglia tried to direct the focus away from his actions by falsely accusing another co-worker of a safety violation and by accusing Mikes of tampering with evidence and being corrupt. He claimed that Mikes' investigation into his safety violation on February 5, 2020 was not the first time Mikes had tampered with evidence in an investigation involving Tartaglia. Tartaglia pointed to the investigations that led to his discharge in 2017 and his Final Warning in 2019. The evidence, however, refuted Tartaglia's attacks on Mikes.

Mikes could not have been involved in the investigation that led to Tartaglia's discharge in 2017. Mikes was not employed by FMBI at that time. Upon realizing this, Tartaglia then accused Mikes of being corrupt because he was later involved in the PSP relating to Tartaglia's 2017 discharge, which occurred *after* the investigation had been completed.

Tartaglia also accused Mikes of tampering with evidence and being corrupt in the investigation that led to the Final Warning in 2019. In fact, Mikes had no involvement in that investigation. Fendrich testified he, not Mikes, was the HR representative that conducted the investigation that led to the Final Warning.

Finally, Tartaglia accused Mikes of tampering with evidence in the investigation that led to his discharge on February 21, 2020. It was never clear, however, exactly what Tartaglia was alleging Mikes did to tamper with evidence because he kept dodging and would not directly answer

questions by the Company's counsel and the ALJ as to what specifically Mikes did to tamper with evidence. Tartaglia did state at one point in his testimony that "parts were missing from the recording." Tr 460. But Tartaglia and the CGC never presented any evidence to support that bald allegation.

Conversely, Mikes testified he did not alter the recording and had neither the knowledge nor the software to do so. Fendrich testified that Mikes did not have the ability alter the recording. Most importantly, Eisner's, Covey's and Potter's testimony was consistent with what was on the recording. Again, in the face of the overwhelming evidence, Tartaglia stood alone in his testimony that "parts were missing from the recording." There simply is no credible evidence supporting Tartaglia's assertion and his testimony should be deemed not credible and disregarded in its entirety.

d. Tartaglia untruthfully claimed he was a RTD operator.

Tartaglia testified he held the position of RTD operator and that when he was reinstated in 2018 he was returned to a RTD position. The evidence showed this also to be untrue. There is no such position or job classification at FMBI of RTD operator. The operation of a RTD is a task assignment only, and is performed by truck drivers who cross-train on a RTD or shovel operators that cross-train on a RTD.

e. Tartaglia untruthfully claimed he didn't refuse to go to training.

Tartaglia still claims he didn't refuse to go to shovel or haul truck training in 2019, which is what led to his Final Warning on April 11, 2019. That testimony, too, was untrue.

Tartaglia was told on numerous occasions by various supervisory personnel that he needed to attend training either for the Shovel Operator position or the Haul Truck Driver position – even giving him the choice of which job he preferred and which training he wanted to attend. When Tartaglia refused to choose, he was assigned to haul truck training beginning on April 1, 2019.

Tartaglia refused again to attend and, as a result, he was placed on the Final Warning. Clearly, the Company had good cause for concluding Tartaglia refused to carry out assigned work. The Company's conclusion was found to be correct by the AAA Arbitrator who determined Tartaglia's actions were a refusal and he upheld the Final Written at Step 4 of Tartaglia's appeal of the Final Warning. So, too, did the NLRB find the Company's' actions to be warranted when it dismissed Tartaglia's Complaint, finding, *inter alia*,

Regarding the Employer's requirement that you attend training, evidence shows that the Employer had a legitimate reason for requiring the training based on its obligation to comply with regulations pertaining to operating heavy equipment and maintaining workplace safety. Regarding suspending and disciplining you for not attending the required training, the Employer was not obligated to accommodate your desire to focus on your personal schedule related to your pursuit of claims against the Employer.

f. Tartaglia untruthfully claimed he was demoted

Tartaglia testified he filed NLRB Charge 28-CA-347609 (9/4/19) (Joint Exh 7) because "I was demoted to a haul truck driver." Tr 357-358 Tartaglia was never demoted. When he refused to choose between Shovel Operator training and Haul Truck Driver training, the Company laterally transferred him with no change in pay to a Truck Driver I.

g. Tartaglia untruthfully claimed he filed charges against Mikes and Fendrich with the NLRB.

Tartaglia testified he filed charges against Mikes and Fendrich with the NLRB. Tr 344; 460 A review of Tartaglia's charges filed prior to his February 21, 2020 discharge (28-CA-210296; 28-CA-234240; 28-CA-241240 and 28-CA-247609) shows that not one of those charges was filed against Mikes or Fendrich, or even mentions their names.

h. Tartaglia untruthfully described the radio communications

To evade the irrefutable evidence provided by the recording (R. Exh 14), Tartaglia said he heard Eisner say, “sorry I could not get on the radio” (Tr 368), inferring that Eisner was speaking to him. Tartaglia claimed he did not hear Eisner say anything about Southwest. Tr 369 By employing the tact of “selective hearing” Tartaglia was trying to create the impression that Eisner could not get on the radio to tell Tartaglia not to pass. But, again, Tartaglia is being untruthful. See R. Exhs 14 (the recording) 15 (transcription of the radio recording) and 16 (transcription of the radio recording with speaker identified). These exhibits all show that without question Eisner was speaking to “Southwest”, not to Tartaglia:

[Tartaglia to Eisner]	AC14, around your right side
[Eisner to Tartaglia]	No, stay behind please
[Eisner to Southwest]	Sorry Southwest, could not get on the radio ¹⁰
[Tartaglia to Eisner]	AC14, around your right side
[Potter to Tartaglia]	He said stay behind
[Eisner to Potter]	Well, actually, I said please stay behind AC14 but it’s too late now

The word “Southwest” is between the words “Sorry” and “could not get on the radio”. It simply is not believable that Tartaglia heard “sorry I could not get on the radio” but did not hear “Southwest”.

B. Unfair Labor Practice Allegations

The GC alleges that FMBI violated Section 8(a)(1) and 8(a)(4) of the [Act] when (1) “[on] February 21, 2020, Respondent, by JP LaFon, in writing, threatened its employees with discharge for filing charges with the Board”, and (2) it discharged Tartaglia because he filed the charges in

¹⁰ Eisner’s communication to “Southwest” was in response to Southwest’s request to pass that was made 18 seconds before Tartaglia requested permission to pass. See R. Exhs 14, 55, 56 and 57.

Cases 28-CA-28-CA-210296, 28-CA-234240, 28-CA-241240, and 28-CA-247609, cooperated in the Board's investigation of those charges, and threatened to file a charge with the Board.

1. The GC Failed To Offer Any Evidence To Support The 8(a)(1) Allegation that FMBI Unlawfully Threatened Its Employees

In the Amended Complaint, the GC alleges that FMBI interfered with, restrained, and coerced employees in the exercise of their Section 7 rights when JP LaFon, in writing on February 21, 2020, threatened employees with discharge if they filed charges with the Board. Complaint at ¶¶ 4 and 6. The GC, however, failed to offer any evidence to demonstrate FMBI threatened its employees.

Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. An employer violates Section 8(a)(1) by threatening employees with discipline, including discharge, if they file charges with the Board. *See OPW Fueling Components*, 343 NLRB 1034 (2004); *Grand Rapids Die Casting Corp.*, 279 NLRB 662 (1986). In deciding whether an employer has made a threat in violation of this prohibition, the Board applies an objective standard of whether the statement would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of their statutory rights, regardless of the motivation for the statement or its actual effect. *See Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), *enfd.* 451 Fed. Appx. 143 (3d Cir. 2011); *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001). The Board considers the totality of the circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

In the case *sub judice*, The GC's 8(a)(1) case rested entirely on a single document: the February 21, 2020 Discharge Notice. On its face, there is nothing in the Discharge Notice that amounts to a threat. Nothing in the Discharge Notice mentions the NLRB. Nothing in the Discharge Notice mentions filing charges with the Board. Nothing in the Discharge Notice

mentions the charges Tartaglia filed with the Board. No evidence was presented that any other employees saw or even heard of the Discharge Notice. No evidence was presented that any FMBI employee was ever threatened, expressly or impliedly, with discharge for filing charges with the Board. No evidence was presented that Tartaglia's charges with the NLRB, or charges with the NLRB generally, was ever discussed or even mentioned.

Additionally, the Company does not deter employees from filing charges with governmental entities. To the contrary, it is the Company's policy and its agreement with its employees that they are free to complain to governmental agencies. This is spelled out in the Mutual Recognition and Agreement Statement between the company and each employee:

Employee and Company acknowledge that nothing in this Agreement prevents Employee from reporting an issue to a governmental agency or from participating in any governmental agency investigation or proceeding.

R. Exh 5 paragraph. Tartaglia and the Company signed this Agreement on December 19, 2019.

Id.

The Discharge Notice on which the GC's 8(a)(1) claim rests was not delivered to Tartaglia until February 21, 2020 – *after* he misrepresented material facts to FMBI during FMBI's investigation of Tartaglia's near-miss safety violation, *after* the decision was made to discharge him for misrepresenting material facts during FMBI's investigation, and *during* the meeting where Tartaglia was informed he was being discharged. The paradox presented by the GC cannot be ignored. That is, the GC is necessarily claiming that while FMBI was in the process of discharging Tartaglia it was simultaneously threatening him with discharge. Under these facts it would be impossible for a discharge notice to reasonably tend to interfere with, restrain, or coerce an employee in the exercise of their statutory rights when being delivered at the same time as the employee is being discharged. *See Divi Carina Bay Resort, supra.*

There is simply no basis to support the allegation contained in Paragraphs 4 and 6 of the Amended Complaint and this allegation should be dismissed.

2. The GC Failed To Prove The 8(a)(4) Allegation that FMBI Discharged Tartaglia For Engaging in Protected Activity

In the Amended Complaint, the GC alleges that FMBI violated Section 8(a)(4) of the Act by discharging Tartaglia because he filed the charges in Cases 28-CA-28-CA-210296, 28-CA-234240, 28-CA-241240, and 28-CA-247609, cooperated in the Board's investigation of those charges, and threatened to file a charge with the Board. Complaint at ¶¶ 5(a), 5(b) and 7.

a. Legal Standard

Because resolution of the GC's allegation turns on motivation, the Board's decision in *Wright Line* is applicable. *Wright Line*, 251 NLRB 1083, 1088-89 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under *Wright Line*, it is the GC's burden to demonstrate, by a preponderance of the evidence, that Tartaglia's protected activity was a motivating factor in his discharge. The GC satisfies this initial burden by showing: (1) Tartaglia's protected activity; (2) Respondent's knowledge of such activity; and (3) anti-union animus on the employer's part. *Id.*

With regard to the third prong of the GC's burden, the Board has held that, in order to prove animus sufficient to carry the GC's initial burden, the GC must establish a causal connection "between the employee's protected activity and the employer's adverse action against the employee." *See, Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 at 1 (2019) This means, that, in order to demonstrate that FMBI's act of discharging Tartaglia was motivated by Tartaglia's protected activity (*i.e.*, filing charges), the GC must establish a link or nexus between Tartaglia's activity and FMBI's act of discharging him. *Id.*

Applying the *Wright Line* analysis to this case, the GC has met the first part of the burden, *i.e.*, that Tartaglia filed charges with the board.

b. Tartaglia's dishonesty during FMBI's investigation was not protected activity

Employers have a legitimate business interest in investigating facially valid complaints of employee misconduct. *See Fresenius USA Mfg., Inc.*, 362 NLRB 1065, 1065 (2015) (citing, *e.g.*, *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), *enfd.* 263 F.3d 345 (4th Cir. 2001)); *see also, Manville Forest Products Corp.*, 269 NLRB 390 (1984) (it is an employer's legitimate right to investigate charges of alleged employee misconduct.)

Here, FMBI had a legitimate business interest for investigating Tartaglia's violation of a Company safety rule. Based on the witness statements of Tartaglia's co-workers (non-supervisory employees) and the recordings of the radio communications, FMBI's decision to investigate was consistent with its safety rules, Guiding Principles and Principles of Business Conduct. In these respects, FMBI's investigation clearly was related to its ability effectively and safely to operate its business.

FMBI conducted its investigation in a manner that was consistent with the purpose of its investigation. When FMBI met with Tartaglia on February 13, 2020, it truthfully explained that several of his co-workers, through their witness statements, and a recording of the radio communications between Tartaglia and the operator of AC14, showed that he had violated FMBI passing procedures SOP MOP083 by driving HT129 past AC14 after being expressly denied permission to do so. The recording was played, on which Tartaglia could be heard saying to AC14, "AC14 around your right", to which the operator of AC14 could be heard to immediately respond, "No, stay behind please." The questioning of Tartaglia, moreover, was reasonably tailored to see if upon hearing the actual radio communication exchange, Tartaglia's memory was refreshed and

if, in light of the recording, he wished to correct his story. FMBI never asked Tartaglia about his union views generally or about any of his past or pending charges filed with the Board – and the CGC and Tartaglia do not contend otherwise. FMBI’s questioning focused exclusively on Tartaglia’s violation of the Company’s passing safety rule.

There is no credible evidence that the investigation occurred in a context of employer hostility to protected union activity or any protected activity in which Tartaglia may have engaged.

There was no evidence that Tartaglia’s false statements to FMBI were or could possibly be protected activity.

Tartaglia’s discipline was consistent with discipline given to others. FMBI’s discharge of Tartaglia for dishonesty was consistent with discipline it had imposed on other employees for similar violations. The evidence showed that between January 2019 and January 2022, 13 other employees were disciplined, up to discharge, for engaging in dishonesty or intentionally misrepresenting material facts. Tr 718-719; R Exh 51 None of the these 13 employees had filed charges with the NLRB. They were disciplined based on the facts applicable to their particular situation. Tr 730. Employers may satisfy their *Wright Line* burden by demonstrating that dishonesty has served as an independent (if not sole) reason for prior discipline, or that a practice of discipline for acts of dishonesty exists. *Fresenius USA Mfg., Inc., supra.* at 1065 (2015)

The CGC’s objection to R Exh 51. The CGC objected to the admission of R Exh 51 because some documents that might have been responsive to the GC’s subpoena duces tecum (No. B-1-1EQFSWP) inadvertently had been missed and, therefore, were not produced. The CGC raised this issue on the final day of the hearing. In fact, the Company responded to the subpoena in good faith, producing documents that it believed were responsive in all material ways to the

GC's subpoena, and, in fact, provided to the CGC what he was said he was seeking, which the CGC described as follows:

I don't want to see everything about this employee, but I want to know the who, what, where, when, and why of the discipline so that I can question the witness, or I could have moved or questioned somebody about their purported comparator evidence."

Tr 739-740

The documents produced to the CGC by FMBI in response to the subpoena provided the "who, what, where, when, and why" regarding the discipline for each for each employee.

c. The GC has not shown FMBI had knowledge of Tartaglia's protected activity

The GC has not shown by a preponderance of the evidence that FMBI's decision makers, those who made the discharge decision, had knowledge of such activity. Tommy O'Neill was reminded that Tartaglia had filed a charge in 2017 because he had no recollection of that charge. O'Neill had no knowledge of any subsequent charge Tartaglia filed with the NLRB, including the most recent charge Tartaglia filed on September 4, 2019 (case 28-CA-247609) challenging his Final Warning. *See, e.g.*, Tr 66; 71-72 More importantly, Haris Kudadiri, the person who made the decision to discharge Tartaglia, testified he had no knowledge that Tartaglia had filed charges with the NLRB – "never heard that before." Tr 305

Lacking knowledge from the FMBI decision makers of any protected activity by Tartaglia, the CGC attempted to prove the knowledge requirement by pointing to Tartaglia's statements that he was turning this matter over to a "federal agency" and that he placed certain people "on notice." Neither of these so-called notices suffices to show that FMBI's decision makers had knowledge of Tartaglia's charges with the NLRB or his intent to file a charge with the NLRB.

Tartaglia statements that he was turning his matter over to a "federal agency" could mean he was contacting any of many federal agencies. Tartaglia's statement alone would not suggest to

anyone that in Tartaglia's mind this meant the NLRB. He could very well have been referring to other "federal agencies", such as the Mine Safety and Health Administration ("MSHA") or the Equal Employment Opportunity Commission ("EEOC"). And if Tartaglia had filed charges with, for example, MSHA and/or the EEOC, that would not amount to protected activity for purposes of the Act. In *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018), the Supreme Court indicated that the pursuit of outside claims, such as by filing charges with other governmental agencies, is not protected activity. Indeed, the NLRB seems to have adopted this position. See *Cordua Restaurant, Inc.*, Unpublished NLRB Order (Aug. 15, 2018) (NLRB vacated decision finding discharge for filing wage and hour collective action unlawful to allow reconsideration in light of *Epic Systems*).

Similarly, Tartaglia telling countless people, including non-FMBI individuals (e.g. AAA Arbitrator Louis Zigman and MSHA ALJ David P Simonton) they are "on notice" is not tantamount to notice that Tartaglia has filed or is going to file a charge with the NLRB. Even Tartaglia concedes this point as is clearly shown in his following testimony:

Q [by Mr. Gordon]. All right. And what do you mean that phrase ["on notice"] when you use it?

A. Just advising them that I got an issue with them. I've presented it to them. Now they're placed on notice.

Tr 536

d. The GC has not shown animus on FMBI's part

Even assuming, *arguendo*, that the FMBI decision makers had knowledge of Tartaglia's prior charges (which they did not), there was no evidentiary support for the third part of the GC's burden – proving that Tartaglia's charges were the motivating reason for the decision to discharge him.

First, it is notable that the record is devoid of any direct evidence that any animus of any type was maintained by the FMBI decision makers toward Tartaglia. Nowhere in the record is

there evidence that Tartaglia's charges –dating back to 2017, with the most recent charge being made about six months before the discharge –were met with hostility, or disdain, or provoked displays of animus in any way. Nowhere in the record is there evidence that there was any discussion of Tartaglia's charges, including in Tartaglia's meetings with Rusinski and Stevens on February 5, 2020, in his meeting with O'Neill, Rusinski and Mikes on February 13, 2020 or in the discharge meeting with LaFon and Mikes on February 21, 2020.

It is not, of course, necessary that the GC's case contain direct evidence of animus. Under certain circumstances, animus may be inferred from circumstantial evidence based on the record as a whole. *See Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), *enfd.* 976 F.2d 744 (11th Cir. 1992), *Electrolux Home Products*, 368 NLRB No. 34 (2019). However, evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline. *General Motors LLC*, 369 NLRB No. 127 (2020). For example, evidence that Rusinski argued with Tartaglia at the February 13th meeting does not support a reasonable inference that union animus was a motivating factor in the decision to discharge Tartaglia. *See e.g., Electrolux Home Products, supra.* (telling employee to “shut up”, while “rude,” not sufficient evidence to establish animus). This is particularly true where Rusinski had no knowledge of Tartaglia's NLRB charges and he played no role in the discharge decision.

But what is that indirect evidence in this case? The sum of it is that Tartaglia filed four charges between 2017 and September 2019 – period! From this, the CGC must urge the ALJ to infer a causal link: that FMBI discharged Tartaglia on February 21, 2020 to retaliate against Tartaglia because of those charges – charges about which Mr. Kudadiri knew nothing.

In sum, the GC's case amounts to the claim that when an employee files a charge with the Board, any subsequent discipline, up to and including discharge, must be assumed to be motivated by unlawful discrimination. The ALJ should not accept that proposition. And on the evidence here, that is exactly what the ALJ would have to do in order to find a violation.

e. Positive intervening events are evidence of a lack of animus

Positive intervening events between protected activity and an adverse employment action can show a lack of animus. Here, between the time of Tartaglia's reinstatement in 2018 and his filing of NLRB charges, and his discharge on February 21, 2020, the Company provided a number of positive benefits to Tartaglia that contradict the notion that they wanted to retaliate against him for filing charges with the NLRB, including:

- Fendrich investigated and absolved Tartaglia of wrongdoing in 2018 when Tartaglia backed a RTD into a pole bridge;
- FMBI acquiesced to Tartaglia's December 2018 request to pause his Shovel Operator training for three months, and then gave him an additional month through March 31, 2019, and the ability to choose which job he preferred to work and then to attend Shovel Operator training or Haul Truck Driver training.
- On September 25, 2019, at Step 3 of Tartaglia's appeal of his Final Warning, Erich Bowers offered to reduce Tartaglia's Final Written to a second written counseling.¹¹
- Following Tartaglia's violation of the passing procedure on February 5, 2020, and going into the February 13th meeting, terminating Tartaglia was not contemplated by FMBI. Rather, on the assumption that the recording would refresh Tartaglia's memory, thus enabling him to correct his statement, O'Neill and Mikes were prepared to give him a Coaching and Feedback, as the other employees involved in the incident received.

¹¹ The second written counseling did not become effective because as Tartaglia testified, he rejected the remedy of a second written counseling and opted to appeal his Final Warning to the next step of the PSP – Step 4, binding arbitration. Tr 351 The sad irony is if Tartaglia had decided to accept the reduced discipline he would not have been at the final step of the Company's progressive discipline process, which means his violations in February 2020 may have resulted in being placed on a Final Warning rather than being discharged.

- f. Intervening events precipitated by Tartaglia defeat the GC's prima facie showing that Tartaglia's protected conduct was a motivating factor in FMBI's decision to discharge Tartaglia

The timing of Tartaglia's discharge is inconsistent with a conclusion that FMBI discharged him in retaliation for his protected activity. First, Tartaglia was not discharged until February 21, 2020 – almost six (6) months after he filed NLRB Charge 28-CA-347609 on September 4, 2019. *See e.g., Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (two month period between protected activity and allegedly retaliatory warning militates against a finding of unlawful motivation).

More importantly, Tartaglia was not discharged until after intervening events occurred that were precipitated by Tartaglia himself, to wit: Tartaglia's violation of the Company's GP when he was untruthful and misrepresented material facts during the investigation of his violation of SOP MOP083, when he drove HT129 past AC14 after expressly being denied permission to do so.

Given the intervening events of Tartaglia's dishonesty and misrepresentation of material facts during the investigation into his safety violation, the timing of his discharge does not support an inference that his discharge was unlawfully motivated. *White Plains Hospital Center*, 2011 NLRB 533 (2011) (citing *Pacesetter Corp.*, 307 NLRB 514, 521-522 (1992)). Indeed, it was these intervening events committed by Tartaglia that dictated the timing of FMBI's actions and ultimately engendered Tartaglia's discharge. *Gaylord Hospital and Jeanine Connelly*, 359 NLRB 1266 (2013) (Charging Party's error between her protected activity and her discharge "was an intervening event which ultimately engendered her discharge"); *see also Woodruff & Sons, Inc.*, 265 NLRB 345, 347 (1982) (discharge immediately after employee's intervening misconduct defeats inference of retaliatory motive.)

VI. CONCLUSION

For all the foregoing reasons, Freeport-McMoRan Bagdad Inc. submits that the Amended Complaint should be dismissed in its entirety.

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Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Respondent's Post-Hearing Brief was E-Filed on March 3, 2022, and served on the following parties by email:

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